FILED
JAN 23 2003

No. 01-1806

In The

Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

Brief of Thirty-Two Commercial Fundraisers and Fundraising Consultants* as *Amici Curiae* in Support of Respondents

CHARLES H. NAVE
Counsel of Record
CHARLES H. NAVE, P.C.
601 MADISON STREET
SUITE 200
ALEXANDRIA, VIRGINIA 22314
(703) 684-4665
Attorney for Amici Curiae

* See Appendix

Table of Contents

TABLE OF AUTHORITIES ii

CONSENT TO FILE 1

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The donors in this case were not defrauded 3

II. The donors in this case were not misled 5

III. Petitioner's proposed relief would undermine constitutional protections and guarantees to which fundraisers and their clients are entitled 8

A. Petitioner's relief would effectively compel speech 9

B. Fundraisers would never know what is illegal 10

IV. Petitioner Seeks Too Much Discretion 16

CONCLUSION 19

APPENDIX ..... A

TABLE OF AUTHORITIES

Cases

Bouie v. City of Columbia, 378 U.S. 347 (1964) 15

City of Chicago v. Morales, 527 U.S. 41 (1999) 19

Riley v. National Federation of the Blind of N.C., Inc., 487 U.S. 781 (1988) ..... passim

Rose v. Locke, 423 U.S. 48 (1975) 15

Ryan v. Telemarketing Associates, Inc., 198 Ill. 2d 345 (2002) 7

Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984) 1, 8, 19

Smith v. Goguen, 415 U.S. 566 (1974) 19

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 1, 8, 9, 19

Statutes

28 U.S.C. § 6115 (2003) 17

Ill. Rev. Stat. ch. 225 para. 2(f) (2003) 6

Ill. Rev. Stat. ch. 225 para. 7(a) (2003) 6

Other Authorities

AICPA, Accounting for Costs of Activities of Not-for-Profit Organizations and State or Local Government Entities that Include Fund Raising, Statement of Position 98-02 14

Heberling, State Lotteries: Advocating a Social Ill for the Social Good, The Independent Review, v. VI, no. 4, Spring 2002, 597-606 5

Lipman, Calling Solicitors to Account, Chronicle of Philanthropy, April 5, 2001 3

Novak and McKinney, Ryan Benefit Ball Gave Just 17%, Chicago Sun-Times, September 10, 2001 17

Rettig, Cancer Crusade: The Story of the National Cancer Act of 1971 (1977) 12

Steinberg, Profits and Incentive Compensation in Nonprofit Firms, Nonprofit Management and Leadership, vol. 1 #2, Winter 1990, 137 14

CONSENT TO FILE

Consent to file this Brief *Amici Curiae*[1] has been obtained from Petitioner and Respondent.

INTEREST OF THE *AMICI*

Amici are commercial fundraisers and consultants.[2] They specialize in raising money for charities. As such, they are quite concerned about fraud in charitable solicitations. And they well understand the public outrage over allegations that a fundraiser kept 85% of donations made to a charity. However, they also know this charge is misleading in this case.

First, there is no nexus between a high cost of fundraising percentage ("CFP") and fraud.[3] This Court has so ruled in Schaumburg, Munson and Riley and *Amici*, along with industry experts, wholeheartedly agree. Second, the contracts attached to Petitioner's complaint plainly show that a portion of Respondents' compensation was for public education efforts advancing VietNow's charitable mission.

Amici's interest in this case is not the welfare of Respondents, but the concern about the consequences of Petitioner's success in this matter. If Petitioner's prayer for

---

[1] Neither party's counsel authored any portion of this brief nor made any monetary contribution to the preparation or submission of this brief. *Amici* provided financial support for this brief directly as well as through American Charities for Reasonable Fundraising Regulation, a nonprofit organization. Consent letters are on file with the Clerk of the Court.

[2] Commercial fundraisers solicit on behalf of nonprofits and often collect contributions before passing them along. Fundraising consultants, by contrast, do not solicit but instead consult with nonprofits on how the nonprofits themselves may make more effective solicitations. Fundraising consultants do not receive, possess, or handle contributions.

[3] Riley v. National Federation of the Blind of N.C., Inc., 487 U.S. 781, 793 (1988); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980); and Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 961 and 966 (1984).

relief is granted, fundraising for charities will undoubtedly become significantly more difficult and expensive because fundraisers will either be compelled to disclose the CFP during each solicitation or they will face potential fraud liability in every solicitation. In fact, they may face fraud liability *even though* they disclose the CFP in every solicitation. Not only will this chill charitable speech and thus injure all Americans to one extent or another, but it would also strip fundraisers' clients (charities) of many of their constitutional rights and guarantees.

SUMMARY OF ARGUMENT

To the extent that fraud in charitable solicitations can be compared to common law fraud, Petitioner's facts and theory do not present sufficient evidence for a *prima facia* fraud case. First, donors were simply not defrauded. They were offered an opportunity to help advance VietNow's charitable mission and that is precisely what they got. Second, the facts do not support Petitioner's argument that donors were misled about Respondents' fee. Respondents affirmatively and fully disclosed this information[4] and, in fact, did so more completely and honestly than did Petitioner in the conduct of his survey.[5]

If Petitioner is allowed to prosecute charitable solicitations fraud complaints with only the evidentiary showing present in this case, he will essentially dissolve certain constitutional protections under the weight of a pervasive, perpetual threat of fraud prosecutions. Petitioner's fraud prosecution theory would essentially compel fundraisers to disclose the CFP (assuming there is agreement on what this is and how it is calculated) in their solicitations as the only conceivable safe harbor against a fraud complaint. And even this safe harbor would not protect them, because

[4] See *infra* note 13.
[5] See *infra* note 14.

there is often no way for a fundraiser to know a CFP before solicitations begin or even while they are being conducted. Fundraisers would essentially be inviting a fraud complaint *every time* they worked on behalf of charities.

Ultimately, Petitioner seeks to arrogate too much discretion to the state and his office under this fraud prosecution theory, and he has already raised questions about his office's ability to exercise this discretion impartially.[6]

ARGUMENT

Petitioner seeks to construct a *prima facia* fraud complaint on the following allegations: (1) Respondent told donors that their contributions would go to certain aspects of VietNow's charitable mission, (2) but because Respondent only turned over 15% of those donations to VietNow,[7] this was substantially and intentionally false or misleading, and (3) had donors known when they were solicited that Respondent would retain 85% of donations, they would not have donated in the first place. There are several flaws with this theory.

I. The donors in this case were not defrauded

Petitioner claims this case is founded on the familiar principles of consumer fraud. But this reasoning does not withstand close scrutiny. Consider a consumer who ordered a cheeseburger and a beer at a restaurant for ten dollars. Later on, a neighbor tells the consumer that he paid for much more than a cheeseburger and a beer. He paid for things he probably wanted, such as refrigeration, napkins, and the

[6] See text accompanying note 37 *infra*.
[7] According to the Chronicle of Philanthropy, this is a rather typical yield for a veterans' group employing a commercial fundraiser. Lipman, Calling Solicitors to Account, Chronicle of Philanthropy, April 5, 2001.

cook's wages. But he also paid for things that he did not want, such as marketing and overhead.

The neighbor says that, in his own calculation, five or more of the dollars he spent went to defray this latter set of costs. In fact, the food he was sold only really cost about one and a half dollars. Was he defrauded?

Of course not. And by the same reasoning, it is unrealistic and irrational to argue that donors were defrauded in this case on similar evidence. Both the consumer and the donor got what they wanted. The consumer got his cheeseburger and beer. And the donor was able to make a contribution to VietNow along with the personal satisfaction, tax deductions, etc. appertaining thereto.

Donors in this case were asked to contribute to VietNow and given examples of what VietNow does to help Viet Nam veterans. However, VietNow donors would probably support most other aspects of VietNow's charitable mission about which they did *not* hear during the solicitation. For example, even though a donor only heard that VietNow helps Chicago-area Viet Nam veterans with rent and food baskets, he would most likely also support VietNow's mission to raise awareness of Viet Nam veterans issues, particularly the POW/MIA issue.[8]

And, just as the consumer can complain that part of his ten dollars went to overhead and marketing expenses, the donor can complain that part of his donation went to administrative and fundraising expenses. But that does not mean either the consumer or the donor was defrauded. This Court has already held that "[d]onors are … undoubtedly aware that solicitations incur costs, to which part of their donation might apply."[9]

---

[8] See *infra* note 14.

[9] Riley, 487 U.S. at 781. *Amici* believe this is a kind of "reasonable donor" doctrine holding that a reasonable donor is not blind to the obvious realities of the nonprofit sector.

If donors wanted 100% of their money to go directly to Viet Nam veterans, their best strategy would be to locate a needy, deserving

In light of all this, it is difficult to see how donors were defrauded by Respondents under Petitioner's theory.[10] Donors contributed to VietNow. At the time they contributed, Donors were told about certain aspects of VietNow's charitable mission. Ultimately, the contributions were indeed devoted to those aspects, but the contributions were also dedicated to other, equally legitimate aspects of VietNow's charitable mission. The contributions also helped defray necessary administrative and fundraising costs that any reasonable donor would expect a charity to incur.

II. The donors in this case were not misled

Petitioner correctly states that Respondents told donors that their donations would be used to further certain charitable purposes of VietNow.[11] Petitioner then argues that because the contract between Respondent and VietNow provided that 85% of funds raised would be retained by

---

Viet Nam veteran themselves and give their money to him directly. This highlights a central purpose of charities that is often overlooked or derided as wasted administrative costs. Charities reduce the transaction costs between the eleemosynary impulse and actual charitable gifts and acts. A major reason why so many people give to charities is that they have economies of scale, they can direct resources efficiently, and they can identify those in need. Once a charity is up and running, a donor can further a charitable mission by merely writing a check rather than undertaking all the associated legwork himself.

[10] In fact it is difficult to understand how the instant case is any more "fraudulent" than state lotteries. Although studies indicate otherwise, the state itself, acting as both regulator and promoter, often tells voters that lottery proceeds will improve school funding or other "public purposes" and occasionally encourages consumers to believe that the chances of winning are greater than they actually are. Despite these "misrepresentations," there is no record of prosecution of state lotteries for fraud. Heberling, State Lotteries: Advocating a Social Ill for the Social Good, The Independent Review, v. VI, no. 4, Spring 2002, 597-606.

[11] Pet. Br. at page i.

Respondent as a fee for its services that the donors were necessarily misled.[12] That is, quite simply, wrong.

First, it is undeniable that Respondents disclosed the terms of its contract with VietNow, including the portion of each donation that Respondents would retain, *before* any solicitation began.[13] Rather than being withheld, this information was affirmatively placed on the public record. Not only that, but the *entire contract* was disclosed, thus making available to the public, including prospective donors, a complete and accurate understanding of the agreement between Respondent and VietNow. Any interested donor could learn that Respondents retained 85% of donations received. Such a donor could also have learned that this 85% fee was not entirely payment for soliciting donations. It included compensation for carrying out VietNow's public education mission and for the associated administrative costs.[14]

---

[12] Pet. Br. at 16.

[13] Ill. Rev. Stat. ch. 225 para. 7(a) (2003) clearly states that "A true and correct copy of each contract [between charities and fund raisers] shall be filed by the professional fund raiser … with the Attorney General prior to the conduct of a fundraising campaign under the contract."

Petitioner admits that Respondent was properly registered for years before this action began. Am. Compl. ¶ 22. Record 8.

Ill. Rev. Stat. ch. 225 para. 2(f) (2003) decrees that "professional fund raisers' contracts … shall be open to public inspection."

In a sense, Petitioner's regulatory regime would compel fundraisers to first incriminate themselves when they file their contracts and subsequently subject themselves to fraud prosecutions when they solicit donations without disclosing a CFR, as they are entitled to do. Riley, 487 U.S. at 799-800. After all, if Petitioner's interpretation of the contract and fraud jurisprudence is correct, how could it *not* be fraud if the fundraiser keeps 85% and fails to disclose that during solicitations? The Attorney General is essentially telling the Respondent that he will register Respondent's contract because there is no constitutional law preventing it, but expect a summons as soon as solicitations commence.

[14] Telemarketing Associates agreed to promote goodwill and otherwise contact the public about VietNow and its charitable mission. Record 21-67, 214-218. VietNow's "primary charitable mission" includes

Respondents were under no obligation whatsoever to reveal any information concerning the cost of fundraising during solicitations.[15] And why should they? As this Court has held before, there is no nexus between a cost of fundraising percentage ("CFP") and fraud.[16] The state's presumption that "the charity derives no benefit from funds collected but not turned over to it" is false.[17] Donors are generally aware that solicitations incur costs and part of their donation will be applied to such costs.[18] And, most importantly, such compelled disclosure will almost certainly hamper legitimate fundraising efforts.[19] If the CFP were an

---

"help[ing] increase community awareness of the difficulties encountered by the veterans and their families" and "increas[ing] national awareness of the POW/MIA status in [sic] supporting other organizations involved in the effort of accountability and release of these veterans." See VietNow National Headquarters 2000 Form 990, Schedule D, Part III available at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp.

> The Supreme Court of Illinois recognized this saying: The contract required Telemarketing to conduct "an efficient and professional marketing program, promote goodwill on behalf of [VietNow], and enhance good public relations." … Defendants in this case were contracted to perform a wide range of activates on behalf of VietNow, all of which were to be paid for out of [Telemarketing's contractual portion of] the solicited funds." Ryan v. Telemarketing Associates, Inc., 198 Ill. 2d 345, 360 (2002).

In contrast, it was *Petitioner's* solicitation of affidavits that was misleading in this case. In Petitioner's survey affidavits, he twice indicated that "80% or more of [the donor's] donation would be used for professional fund raising expenses" even though Petitioner had in his possession clear evidence to the contrary, namely the fundraising contracts clearly indicating that Respondent was undertaking far more than just fundraising.

[15] Riley, 487 U.S. at 798.

[16] See *supra* note 3.

[17] Riley, 487 U.S. at 798.

[18] Riley, 487 U.S. at 799.

[19] Riley, 487 U.S. at 799.

important and material matter to the donor, he was free to inquire about it.[20]

III. Petitioner's proposed relief would undermine constitutional protections and guarantees to which fundraisers and their clients are entitled

Petitioner seeks this Court's blessing for a radically new fraud prosecution theory. For decades, this Court has explicitly recognized that charitable solicitations and charitable speech are inextricably intertwined and thus merit the full protection of the First Amendment.[21] This Court, citing the real-life practicalities of charitable fundraising, has held that a high CFP is no indicator of fraud in charitable solicitations.[22] Petitioner's relief would necessarily reverse these rulings, pare back First Amendment protections, and

---

[20] *Amici* strongly believe that such donor inquiries deserve truthful and accurate answers. If a solicitor misleads a donor in answering such a question, he is clearly liable for fraud.

In fact, it appears that Petitioner *already* had the elements necessary for such a *prima facia* case. One donor specifically asked how her donation would be spent and was told that "90% or more goes to the vets." Record 358. It also appears that Petitioner had enough evidence to file a *prima facia* case against Respondents for self-dealing and/or breach of fiduciary duty for their practice of negotiating on behalf of themselves and on behalf of VietNow in the same transaction. Am. Compl. ¶¶ 12-13. Record 5

It is strange, then, that Petitioner chose to challenge long-standing First Amendment jurisprudence when he had what appears to be powerful and uncontroversial evidence of other malfeasance by Respondents. At the very least, this evidence of affirmative misrepresentation and self-dealing undermines Petitioner's assertion that he would be nearly powerless to stop fraud in charitable solicitations if his relief is denied. To the contrary, it appears that Petitioner seeks authority to prosecute cases of "fraud" where no such evidence exists – in other words where there is merely a high CFP.

[21] Schaumburg, 444 U.S. at 632; Riley, 487 U.S. at 796.

[22] Munson, 467 U.S. at 961, 966; Riley, 487 U.S. at 793, n. 7.

thus chill charitable speech.[23] *Amici* believe that these arguments are already well represented to this Court. Rather than join that chorus, *Amici* will point out the other threats to a fundraiser's and charity's constitutional rights that this prosecution entails.

A. Petitioner's relief would effectively compel speech

According to Petitioner's complaint, Respondents must face fraud charges to answer allegations that they misled one or more donors about what portion of their donations would go to VietNow. Therefore, if Petitioner's prayer for relief is granted, to avoid fraud liability commercial fundraisers and charities must necessarily conduct their solicitations such that *no* donor misunderstands how much of his donation is physically turned over to the charity.[24] And if one discloses *this* percentage, then he

---

[23] Petitioner claims he is neither arguing that Respondents' fee is *per se* unreasonable (Pet. Br. at 41) or that he is compelling speech (Pet. Br. at 46-49). But the facts belie this. In his Complaint, Petitioner does characterize the fee as unreasonably high (Am. Compl. ¶¶ 32, 43, 70-72. Record 11, 13, 321-322) and he does fault Respondent for not disclosing his fee during solicitations (Am. Compl. ¶¶ 38, 67F-67N (52-61). Record 12, 209-212.)

More importantly, the prosecution theory that Petitioner seeks to vindicate necessarily relies on either or both of these unconstitutional concepts. The only way for fundraisers to immunize themselves against fraud suits under Petitioners' theory is to disclose their CFP during solicitations. It is unconstitutional to institute such a requirement. Riley, 487 U.S. at 799-800.

At the same time, there is an implicit ceiling on "reasonable" fees. If Petitioner can bring a fraud action whenever he can gather a certain number of affidavits stating that donors would not have given if they knew the CFP was "that high" (and there's no reason to believe the minimum number of affidavits is not one), then there is a ceiling on reasonable fees determined by the local community. This, too, is unconstitutional. See, e.g., Schaumburg, 444 U.S. at 636-637.

[24] This position assumes that only funds actually turned over to the charity advance the charitable mission. This Court rejected that

necessarily discloses the percentage that is *not* turned over to the charity. This is precisely the type of compelled speech declared unconstitutional in Riley.[25]

There are numerous reasons why this Court found such compulsion to be both poor policy and unconstitutional. They are briefly listed, *supra*, on page 7. All of these reasons are still valid today. Petitioner simply cannot compel speech, whether through legislative enactment or through the threat of prosecution.

B. Fundraisers would never know what is illegal

Under Petitioner's theory, a solicitor is committing fraud if he fails to voluntarily disclose to a donor that a substantial portion of the donor's contribution will be used to defray the costs of solicitation. Thus, Petitioner assumes that a solicitor will have in mind at least a reasonably accurate estimate of how donations will be allocated, and in particular a good idea of what the CFP will be, *when he makes the solicitation*. But in many cases, this is simply not possible.

A review of fundraising contracts filed with the states (which are publicly available) shows that most fundraisers are compensated on a fee-for-service ("FFS") basis rather than on a percentage basis. In other words, rather than receiving a percentage of every donation raised, the fundraiser is compensated for every donor to whom he talks, or every hour he talks, or every direct mail solicitation upon which he consults. Thus, even if the parties may have an estimate of what the fundraising expenses will be before a

---

proposition at Riley, 487 U.S. at 798. N.B. Recall that fundraising consultants never receive donations. Instead, contributions go directly to the charity as the consultant merely advises the charity on solicitation strategy and technique in return for a fee. How then should a consultant immunize himself when the charity makes the solicitation and neither knows in advance what percentage the fee will be of the funds raised?

[25] Riley, 487 U.S. at 800.

solicitation campaign begins,[26] they have no idea how many donations will be made. The campaign could be very successful or it could be an abject failure, often because of factors beyond the control of either the charity or the fundraiser. If many donations are received, the cost of fundraising percentage ("CFP") will be low.[27] If few donations are received, the CFP will be high.

There are numerous factors affecting the success of any charitable solicitation campaign. Although the charity and fundraiser have a wide variety of fundraising media from which to choose, their success is often dictated by factors beyond their control. The weather is an example. A charity could engage a fundraiser to plan and manage a fundraising event such as a charity auction, a ball, or a dinner with a featured speaker. The charity could pay or commit to pay for facility rental, catering deposits, decorations, invitations, and any number of other expenses. But if a storm strikes on the day of the event, the charity might raise very little money beyond expenses, which would give it a high CFP. In fact, it could very well lose money, which yields a CFP greater than 100%. The uncertainties do not end with the weather.

Charitable fundraising is affected by myriad factors. Does the charity have an established "brand name?"[28] Does

---

[26] This would be ascertainable, for example, if the charity and the fundraiser agreed to send out a certain number of solicitation letters and the fundraiser was paid a certain amount per letter mailed.

[27] This, of course, assumes that the CFP can be calculated in some rational, objective manner. For the difficulties associated with this endeavor, see Brief *Amici Curiae* of Association of Fundraising Professionals et al. section II.

[28] It is much easier for the American Red Cross to raise money than for the Brand X Disaster Relief Society. Even as venerable an organization as the American Cancer Society was a "startup" at some point. The American Cancer Society was founded in 1913. Until 1943, the Society was "chiefly concerned with the improvement of treatment facilities and the professional education of physicians" and spent nothing on research. Lawyer Emerson Foote "found the organization unbusinesslike and incapable of conducting a first-rate fundraising drive" in 1944. Mary

the charity have and can it use a significant base of volunteers to defray the administrative costs of running a charity and soliciting donations? Did the charity start out with a government or foundation grant that makes its CFR look low at the outset? Is the charity popular?[29] And there's the biggest "X-factor" of all: timing.[30]

Thus, FFS fundraisers operating in good faith and with no intent to defraud – indeed, operating with the understanding that their anticipated overhead costs are reasonable – could, through no fault of their own, become liable for fraud. Under Petitioner's theory, if donors discovered that the CFP was dramatically higher than they expected, and then decide that they would not have donated had they known the final CFP when they were originally solicited, the fundraiser and/or charity would be liable for fraud. Petitioner's theory has no room for explanations, qualifications, weather emergencies, context, or

---

Lasker personally retained a professional fundraising firm to help the 1945 campaign on the condition that a mere 25% of the funds raised be earmarked for cancer research. Thus, an outsider advanced funds for the charity's first big campaign and this campaign was run by an independent for-profit fundraising counsel. Rettig, Cancer Crusade: The Story of the National Cancer Act of 1971 at 20-21 (1977).

[29] For example, in the early 1980s AIDS charities were viewed with suspicion, but today they are well accepted and have many loyal donors outside the communities initially believed to be affected by the disease.

[30] Prior to September 11, 2001 Islamic charities soliciting donations in the United States did not raise too many eyebrows. Today, suspicion and mistrust hamper their fundraising efforts.

The effects of some of these factors can be estimated before solicitation campaigns begin. Even so, the charities have no control over them and Petitioner's prosecution theory would arbitrarily make them more liable to a fraud charge merely because they were less well known, had fewer volunteers, had never received a grant, etc.

understanding.[31] It merely compares actual CFP with donor's expectation.[32]

Fundraisers operating under percentage-based contracts would face similarly pervasive liability, but for different reasons. As argued in Brief *Amici Curiae* of Association of Fundraising Professionals et al., there are numerous uncertainties in calculating the CFP. A fundraiser operating under a percentage-based contract could take into account all the public education work and any other efforts furthering the charity's mission, come up with a good faith CFP, and perhaps mention it during solicitations. He could then be subject to fraud prosecution under Petitioner's theory in at least three situations.

First, after contributing, a donor could calculate the CFP using his own ideas about what is included and excluded from the calculation and using information disclosed by the charity or the fundraiser or both. If the donor's CFP differed significantly from the fundraiser's CFP (which is entirely possible given the many ways in which a CFP can be calculated from the same data) the fundraiser would now be guilty of fraud under Petitioner's theory.

Second, a regulator or watchdog could have calculated the CFP using his own terms, or simply taken the percentage from the contract[33] without accounting for the

---

[31] *Amici* Council of Better Business Bureaus, Inc. et al. admit this in their brief at page 24.

[32] Even if fee-for-service ("FFS") fundraisers used their CFPs from past years as an estimate in current solicitations, they would not escape this pervasive liability. If something went wrong in the current year and the CFP changed, as it invariably does, the fundraiser would be committing fraud, under Petitioner's theory, with respect to donors who were told about the previous year's CFP and whose donations were spent according to a new, higher CFP.

[33] Incidentally, Petitioners and other states implicitly discriminate against charities that must raise money through percentage contracts. The federal government allows charities to report "joint costs" – costs which are attributable to program services, "management and general" expenses, and to fundraising – and allocate them to these three categories on their

fundraiser's work advancing the charitable mission, and conveyed it to the donor, as happened in this case. The donor, faced with new information from a supposedly unbiased and knowledgeable third-party will likely accept it at face value and consider himself defrauded.

Third, the fundraiser could elect not to mention the CFP at all and the donor could decide after the fact that the CFP was higher than he expected it to be.

---

annual information return to the Internal Revenue Service. (See IRS Form 990, Part II. Many states accept a copy of the Form 990 in lieu of a separate financial report from charities. Petitioner requires charities to file a copy of their Form 990 in addition to another Illinois-specific annual report form.) However, joint cost allocation is done pursuant to a rule promulgated by the American Institute of Certified Public Accountants which allows joint allocation of costs in FFS contracts but not in most percentage-based contracts. AICPA, Accounting for Costs of Activities of Not-for-Profit Organizations and State or Local Government Entities that Include Fund Raising, Statement of Position 98-02, para. 10.

Thus, many states have adopted a rule that necessarily overstates fundraising fees in percentage-based contracts that obligate fundraisers to perform public education work for the charity. This misleads the public into thinking that these charities spend more on fundraising than they actually do.

This also discriminates against charities which must use percentage-based contracts. Although there are many reasons to avoid such contracts (See, e.g., http://www.afpnet.org/content_documents/2002_AFP_Code_of_Ethics.pdf .), many new charities without grants or other "seed money" have little choice.

> Small or new nonprofit organizations that lack the expertise or resources to conduct their own campaign may prefer to negotiate an incentive contract [with an outside firm] as a way of shifting risk onto those better able to bear it … if the campaign is more successful than anticipated, the nonprofit must give up an extra share of net receipts. In effect, this extra payment is an insurance premium. Steinberg, Profits and Incentive Compensation in Nonprofit Firms, Nonprofit Management and Leadership, vol. 1 #2, Winter 1990, 137.

The ultimate result of all this is that no fundraiser, whether he operates on a FFS basis or on a percentage basis, will be able to raise money in good faith without exposing himself to fraud liability. This is unconstitutional. Even fundraisers are entitled to know what the law is before they take action.[34] They cannot be held accountable because their actions, which were perfectly honest and legal at the time, appear fraudulent by fiat of a regulator's hindsight. Yet this is precisely the standard by which Petitioner seeks to judge fundraisers, both those operating under FFS contracts and those operating under percentage-based contracts.

Because the final CFP under a FFS contract is especially unpredictable, these appeals will be chilled most. Thus, charities will be more reliant on the "unethical" percentage-based contracts[35] simply because the CFP is more foreseeable, although frequently higher.

In the world into which Petitioner invites us, charities and fundraisers stand perpetually on a trap door, waiting to plunge into oblivion at any moment. They could be operating in good faith, complying with constitutionally sound registration, reporting, and disclosure laws, and entirely innocent of even any *intent* to defraud. Suddenly, they can be haled into court to prove their innocence, all the while suffering incalculable damage to their reputation and incurring stiff legal bills to protect their First Amendment right to communicate with the public.

---

[34] See, e.g., Rose v. Locke, 423 U.S. 48, 49 (1975) (holding that "[i]t is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed'"). See, also, Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) (holding that "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language").

[35] See *supra* note 33.

IV. Petitioner seeks too much discretion

Throughout this case, Petitioner seeks to vest a dramatic amount of discretion in the state. He claims the discretion to determine how the CFP is calculated. He claims discretion to determine what fundraising fees are reasonable. He claims the discretion to determine when solicitations are substantially misleading. He claims discretion to determine when he has enough evidence to send out survey affidavits. He claims discretion to determine when he has enough executed survey affidavits to serve a complaint. In all, and considered along with the implications of the theory he seeks to impose, this is a power of dramatic scope and reach. It seems reasonable to ask whether Petitioner will exercise this discretion fairly and impartially.

It appears that Petitioner may have a political test for fraud prosecutions. Petitioner claims that Respondents' fee was too high and fraudulent when VietNow received only 15% of the money raised. However, Petitioner had no such objections to an Illinois charity fundraising event that only passed 17% of the money raised along to charities.

This Illinois millennium gala was quite misleading by the standards proffered by the Attorney General. Donors were told it was a "charity ball" and that the proceeds would go to charity. Donors paid $500 or $1000 to attend and they were informed that they could take a charitable tax deduction for all but $250, which was the fair market value of the meal and entertainment. A reasonable donor could easily assume that if the value of the meal and entertainment was $250, then the remaining $250 (of the $500 ticket, or 50% of the donor's payment) or $750 (of the $1000 ticket, or 75% of the donor's

payment) paid would be donated to charity.[36] Nevertheless, only 17% of the revenue ever went to charity.[37]

Much of the rest was spent on fundraising fees and expenses. A well-connected full-time state employee already earning $100,000 annually was paid an additional $43,800 (more than double the money that went to one charity) to organize the single event. $145,000 was spent on catering. $350,000 was spent on one entertainer alone.[38]

There is every indication that the fundraiser allowed donors to believe that a substantial portion of their ticket price would go to charity, when, in fact, only 17% did. Yet the Attorney General refused to investigate the matter.

It is unclear why this event was never investigated or prosecuted for charitable fraud. The Attorney General explained that "the amount of money we're talking about that was spent on overhead expenses and vendors … given the nature of the event, doesn't suggest they've run afoul of the law, which would prompt this office to do something. If there's information beyond that, give it to us."[39] And this may be a reasonable explanation,[40] but some concern was expressed that no investigation was undertaken because the gala's host, Illinois House Leader Lee Daniels, was a "key supporter of [Attorney General] Ryan's bid for governor."[41]

---

[36] And he would find a sound foundation for this belief in the Internal Revenue Code and Regulations. 28 U.S.C. § 6115 (2003)

[37] Novak and McKinney, Ryan Benefit Ball Gave Just 17%, Chicago Sun-Times, September 10, 2001.

[38] Ibid.

[39] Ibid.

[40] Although it seems a similarly reasonable explanation could be made for Respondents, to wit: they conducted and paid all expenses for VietNow's public education campaigns; they recruited new donors each year; and the independent, uncompensated board of directors was pleased enough with the arrangement to renew the contracts. This sounds at least as reasonable as the Attorney General's explanation for the millennium gala, particularly since there is no evidence that Respondents spent as lavishly as the "charity ball" spent on catering and entertaining.

[41] Ibid.

This unexplained difference in treatment of the instant case and the millennium gala raises the question of whether, under Petitioner's theory of fraud, some fundraisers will be exempt from prosecution by various state Attorneys General and, conversely, whether others will be singled out for prosecution based on their political ties, political beliefs or persuasions, or lack thereof.

Petitioner argues that his prosecution theory will not "invite arbitrary prosecution of charities whenever the Attorney General believes their fund-raising expenses are 'unreasonable.' What is important under the law of fraud, and what Illinois alleged here, is not what the Attorney General *believes* in the abstract, but what the *victims specifically* understood based on what Respondent *actually told them*."[42]

Again, the facts undermine Petitioner's claim. The genesis of this case was *Petitioner's* belief that Respondent's public education work on behalf of VietNow was negligible or a sham. *Petitioner* believed that Respondent's contractual fee represented compensation for fundraising and nothing else, despite the contracts in his possession proving the contrary. Petitioner then sent out survey affidavits that misled donors into believing that "80% or more of [the donor's] donation would be used for professional fund raising expenses."

It is particularly difficult to believe Petitioner's claim that his relief would not "invite arbitrary prosecution of charities" when one compares the dogged, decade-long prosecution of this case through four courts to the utter indifference Respondent showed to investigating the "charity gala" which turned only 17% of funds raised over to charity but was sponsored by a key political supporter. Overall, it

[42] Pet. Br. at 28 n. 23 (emphasis in original).

appears that Petitioner's theory accretes far too much discretion in his office to pass constitutional muster.[43]

In the end, Petitioner seeks to subject *every* charity or commercial fundraiser soliciting contributions from the public to fraud liability at *any* time. His power would be circumscribed only by his own discretion, and he seeks the same license for every other state and local prosecutor in the United States.

CONCLUSION

Under the jurisprudence of Schaumburg, Munson, and Riley, and for the foregoing reasons, Petitioner cannot constitutionally premise a fraud complaint on a cost of fundraising percentage and his relief should therefore be denied.

Respectfully submitted,

Charles H. Nave
Counsel of Record

[43] See, e.g., Smith v. Goguen, 415 U.S. 566, 575 (1974) (invalidating a "standardless" legal theory that "allows … prosecutors … to pursue their personal predilections.) See also, City of Chicago v. Morales, 527 U.S. 41, 63-64 (1999).

APPENDIX:
Amici Curiae

Abbe & Associates:
Philanthropy Solutions
Arlington, TX

Adams, Hussey &
Associates, Inc.
Washington, DC

Amergent
Peabody, MA

Black Mountain
Communications, Inc.
Scottsdale, AZ

Carl Bloom Associates,
Inc.
New York, NY

Charitable and
Philanthropic Management
Counsel
South Boston, MA

Craver, Mathews, Smith
and Company
Arlington, VA

Creative Direct Marketing
International
Annapolis, MD

Creative Direct Response
Crofton, MD

DMW, LLC
Braintree, MA

donordigital.com, LLC
San Francisco, CA

Epsilon Data
Management
Burlington, MA

GSB Associates, Inc.
Trumansburg, NY

Jeremy Squire &
Associates, Ltd.
Oakton, VA

The JM Advancement
Organization
Sarasota, FL

KMA Direct
Communications
Plano, TX

Lautman & Company
Washington, DC

Mailworks, Inc.
Chicago, IL

Mal Warwick and
Associates, Inc.
Berkeley, CA

Mansfield & Associates,
Inc.
Alexandria, VA

McGrath and Company
Westmont, IL

MDS Communications
Corporation
Mesa, AZ

Meyer Partners
Palatine, IL

New Designs
Frederick, MD

Public Interest
Communications, Inc.
Falls Church, VA

Quadriga
New York, NY

Sanky Perlowin
Associates
New York, NY

Share Group, Inc.
Somerville, MA

Steve Cram and
Associates
Fairfax, VA

Synergy Direct Marketing
Solutions
Fairlawn, OH

Warfield and Walsh, Inc.
Alexandria, VA

Whitney Associates
Portland, OR